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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 125

FRED T. LEY & COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION

The memorandum opinion below (R. 11, 12) is reported in 60 Ct. Cls. 654.

JURISDICTION

The judgment was entered on May 4, 1925 (R. 12) and the petition for appeal was filed on May 12, 1925 (R. 12). The jurisdiction of this Court is invoked under Sections 242 and 243 of the Judicial Code as they stood prior to the time the Act of February 13, 1925 (chap. 229, 43 Stat. 936) became effective.

THE QUESTION

There was a cost-plus contract for the construction of cantonment buildings which provided that the contractor should be reimbursed for such bonds and insurance as the contracting officer approved or required. Can the contractor in such a case recover the cost of public liability insurance where the contracting officer never approved, required, or authorized the same, but consistently declined to approve same?

STATEMENT

The appellant made a contract with the Government for the construction on a cost-plus basis of certain cantonment buildings at Camp Devens, Massachusetts. (R. 9.) The contract provided that the appellant should be reimbursed (R. 5, 6)—

> for such of its actual net expenditures in the performance of said work as may be approved or ratified by the Contracting Officer and as are included in the following items:
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> * * * * *
>
> (h) Such bonds, fire, liability and other insurance as the Contracting Officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, * * * found * * * to have clearly resulted from causes other than the fault or neglect of the contractor * * *.

This left the contractor to bear cost of insurance against losses resulting from his own fault, unless

the Contracting Officer saw fit to authorize the insurance as part of the cost of the work.

It also provided that "Contracting Officer" should mean his successor in office, or any person to whom such duties were assigned by the Secretary of War, and any duly appointed representative of the contracting officer. (R. 8.) The contract was dated June 14, 1917. (R. 9.) After entering upon the work appellant took out a policy of insurance covering public liability insurance. On June 23, 1917, the officer in charge of cantonment construction informed appellant that it should carry such insurance as the contracting officer might direct and that the Government would carry its own risk against fire and public liability damage. The contracting officer disapproved the action of appellant in taking out the liability insurance, and notified appellant that he did not consider the cost of same a proper item of the work. (R. 9.) On June 28, 1917, the contracting officer sent to appellant and to each of the other fifteen contractors engaged in cantonment construction, a telegram advising them to obtain insurance protecting material against fire between the time of delivery by the carrier and acceptance by the Government, and also recommending compensation insurance as required by the statutes, but stating that other insurance risks were assumed by the Government. (R. 10.)

Several communications passed between the appellant and the representatives of the Government,

but in no instance did these insurance policies here in question receive the approval of the contracting officer. The constructing quartermaster at the Camp sent several policies taken out by appellant to the officer in charge of cantonment construction, who returned the same, disapproved, as not being a form of insurance that was authorized. This disapproval was communicated to appellant. (R. 10.)

Other communications by appellant followed. "The Government officers adhered to their decision." (R. 10.) Appellant then claimed that the policy had been authorized by the constructing quartermaster. (R. 10.) The officer in charge of cantonment construction advised appellant that the telegram had prohibited such policies, and he could not understand why they had not been canceled, in spite of the claimed authorization of the constructing quartermaster. (R. 11.) The Court of Claims also found as follows (R. 11):

> A number of communications passed between the parties on the same general subject of public liability insurance, with the result that the contracting officer declined to approve the taking out of policies covering the same.
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> * * * * *
>
> The evidence fails to show that the public liability insurance taken out by the plaintiff (appellant) was ever required, approved, or ratified by the defendant's (appellee's) contracting officer or his successor in office or

any other person to whom the duties of the contracting officer were assigned by the Secretary of War, or by any duly appointed representative of the contracting officer.

In these circumstances the Court of Claims dismissed the petition, holding that the insurance was never authorized, and there was no obligation upon the part of the Government to pay the premiums therefor.

SUMMARY OF ARGUMENT

The contract provided that insurance premiums should be considered a part of the cost only when the contracting officer authorized or approved such insurance. The Court has found as a fact that the evidence fails to show that such insurance was ever required, approved, or ratified by the contracting officer; therefore appellant can not recover.

ARGUMENT

This case is wholly without merit and the appellant's argument is based on a statement of facts abounding in inaccuracy and in part flatly contradicted by the record. The suit was to recover the premiums paid by appellant for public liability insurance. The appellant had a contract with the Government to construct certain buildings at Camp Devens, Massachusetts. The contract provided that the Government should pay to appellant such actual net expenditures as might be approved or ratified by the contracting officer and as were included in certain items enumerated in such contract,

among which items were "such bonds, fire, liability and other insurance as the Contracting Officer may approve or require * * *." (R. 5, 6.) The Court of Claims has found specifically that procuring public liability insurance was never authorized or approved and was specifically disapproved by the contracting officer. That is all there is to the case, and further argument would be a mere repetition of the statement of facts.

The appellant contends that this case is exactly like two other cases in which the contractor recovered bond and insurance premiums, and that therefore appellant in this case should recover. The two other cases referred to were decided upon the facts found by the court in such cases, which facts are different from those found in the case at bar, and the findings in the case at bar preclude any recovery. This case must be decided on the findings in it and not on the record in some other case.

The appellant refers to the case of *Mason and Hanger* (56 Ct. Cls. 238; 260 U. S. 323). The only question there decided by this Court is that the bond premiums were a proper part of the cost. The Court of Claims did hold that insurance premiums should also be allowed, but the facts in that case specifically show that the contracting officer approved that insurance. (See 56 Ct. Cls. 238, 241.) In the case at bar the court found that the contracting officer refused to approve it. The appellant also refers to the case of *Bates and Rogers*

Construction Co. v. *United States* (58 Ct. Cls. 392). The record in that case shows that the court considered that the contracting officer approved the insurance, and the findings disclose that the contracting officer approved the insurance in the *Mason and Hanger case*, and that the Government stipulated in the *Bates and Rogers case* that the further disposition of the *Bates and Rogers case* should in all respects be governed by the decision in the *Mason and Hanger case* (58 Ct. Cls. 392, 396, 397). Therefore the findings in these cases are different from the findings in the case at bar. The Court of Claims found that the form of the contracts was the same in the case at bar as in the other cantonment cases, but certainly did not find that the proceedings thereafter were at all alike; and specifically found that the contracting officer declined to approve this insurance.

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

HERMAN J. GALLOWAY,
Assistant Attorney General.

JANUARY, 1927.

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